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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matters of)
)
Rulemaking to Amend Part 1 and)
Part 21 of the Commission's Rules)
to Redesignate the 27.5-29.5 GHz)
Frequency Band and to Establish)
Rules and Policies for Local)
Multipoint Distribution Services)
)
Applications for Waiver of the)
Commission's Common Carrier)
Point-to-Point Microwave Radio)
Service Rules)

CC Docket No. 92-297

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

PETITION FOR RECONSIDERATION

Northeast Wireless, High Band Broadcasting Corp., FM Video Broadcasters, and Western Sierra Bancorp ("Petitioners") hereby request that the Commission reconsider in part its Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration ("Notice"), FCC 92-538, released January 8, 1993, denying inter alia Petitioners' applications¹ for authority to provide new video distribution service in the 28 GHz spectrum. Notice at ¶¶ 53, 82. For the reasons set forth below, such

1 Petitioners' proposals were filed subsequent to the FCC's grant of a waiver request in *Hye Crest Management, Inc.* The applications and markets at issue here are: Northeast Wireless, Portland, Maine (File No. 9216480); High Band Broadcasting Corp., Flint, Michigan (File No. 9211860) and Hamilton, Ohio (File No. 9211861); FM Video Broadcasters, Salem, Oregon (File No. 9211185) and Fayetteville, North Carolina (File No. 9211609); Western Sierra Bancorp, Orange County, New York (File No. 9216024) and Galveston, Texas (File No. 9215941).

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portion of the Notice as affects Petitioners' applications should be reversed.

Clear instructions concerning the appropriate course for the FCC to follow when presented with a compelling waiver request were laid out over twenty years ago by the U.S. Court of Appeals. The Court directed that the FCC has a general duty to consider waivers of the rules as a matter of administrative due process.

[A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.

* * *

[A] system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the 'public interest' ... [w]hich includes an obligation to seek out the 'public interest' in particular, individualized cases.

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Applications presented "with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look'." WAIT Radio, 418 F.2d at 1156. Additionally, the Commission must articulate a reasoned basis for its disposition. Id.

In the Notice, the FCC denied all pending waiver requests because, it asserted, to grant them *in toto* "would amount to a de facto reallocation of the 28 GHz band," would be "inconsistent with the Commission's suggestion that it would not grant a flood of such requests," and "would be detrimental to the assigned

users" of the spectrum. The Commission also stated that it "see[s] no basis for distinguishing among any of the individual requests in an equitable fashion." Id. at ¶ 53.

Petitioners do not dispute that a massive grant of hundreds of waiver requests would have been improper. At the same time, however, as the Commission implicitly acknowledged in the Notice, were specific waiver proposals (a) distinguishable from the others, (b) compelling, and (c) not so numerous as to constitute a de facto reallocation of this spectrum, such proposals would have required a grant.

There is a rational and compelling formula to be applied in this proceeding which, Petitioners submit, steers a true course through the array of competing interests at play and satisfies the three above-noted criteria. This formula is as follows: (1) If an application appeared as accepted for filing on the FCC's public notices and no other mutually-exclusive applications were subsequently filed; and (2) if a conventional wireless cable system (in the 2.5 GHz band) cannot be established in the market -- then compelling grounds exist for the Commission to grant the 28 GHz application in question.

The determination under the first criterion is a simple procedure, merely requiring an inspection of the FCC's 28 GHz data base. The determination under the second criterion, equally straightforward, involves an assessment as to whether, either because of legal restrictions or geographic restrictions, residents of the market in question are likely ever to receive

conventional wireless cable service. The legal impediments to a market's receiving wireless cable service have to do with the FCC's proscription against MMDS applications proposing to serve PMSAs and with the limitation, under Part 21, on the radius of MMDS service areas. Where a given market in a PMSA is so distant from the CMSA's hub that it cannot receive conventional wireless service, a "legal impediment" to such service can be said to exist. Similarly, where the prospect of a future conventional wireless system's serving a given market is precluded because of the configuration and proximity of adjacent operating wireless cable systems, a "geographic limitation" to such service exists.

Applying this formula to the hundreds of applications filed in this proceeding yields a discrete group of merely six markets: Portland, Maine; Flint, Michigan; Hamilton, Ohio; Salem, Oregon; Orange County, New York; and Galveston, Texas. Petitioners believe it is eminently in the public interest that these several applications be granted at this time. Because of the likelihood that the FCC will not begin licensing 28 GHz facilities for at least twelve months, the immediate grant of these applications will give the Commission a valuable opportunity to witness the economic and technical viability of this service in markets representative of a cross section of potential LMDS markets nationwide. Moreover, given that no other parties have expressed interest of any kind in these markets, grant of the applications can fairly be said to be unprejudicial. Finally, the fact that conventional wireless service will, in all likelihood, never be

available in these markets is in itself a compelling factor favoring a grant of these particular applications.

For these reasons, Petitioners ask that the FCC reconsider such portion of the Notice as denies their applications, that this reconsideration petition be granted, and that Petitioners' waiver applications be granted expeditiously.

Respectfully submitted,

**NORTHEAST WIRELESS, HIGH BAND
BROADCASTING CORP., FM VIDEO
BROADCASTERS, and WESTERN SIERRA
BANCORP**

By: Michael G. Neville
Michael G. Neville, Esquire
Suite 301
7535 Little River Turnpike
Annandale, Virginia 22003
(703) 658-6060

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